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Lead Story: Using Non-Hearsay To Admit Statements In Documents And Connect Key Evidence

Documents may contain key evidence connecting other evidence to a party or a transaction. However, statements contained in documents may be inadmissible on hearsay grounds, under FRE 802. The hearsay bar does not apply if either (a) a hearsay exception is available or (b) the statement is introduced for a non-hearsay purpose. This Lead Story surveys the use of the non-hearsay theory to introduce documents without being subject to a hearsay challenge.



Policy Reasons Hearsay Evidence Is Inadmissible

Hearsay evidence is excludable as a matter of rule and policy. The Second Circuit summarized some of the common bases:

“The hearsay rule is generally said to exclude out-of-court statements offered for the truth of the matter asserted because

there are four classes of risk peculiar to this kind of evidence: those of (1) insincerity, (2) faulty perception, (3) faulty memory and (4) faulty narration, each of which decreases the reliability of the inference from the statement made to the conclusion for which it is offered.”

Schering Corp. v. Pfizer, Inc., 189 F.3d 218, 232-33 (2d Cir. 1999) (citations omitted); *see also United States v. Norwood*, 798 F.2d 1094, 1098 n.4 (7th Cir.) (noting three reasons for excluding hearsay: “First, the declarant, that is the person who made the statement, rather than the intermediary who relates it, was not under oath when he made the statement. Second, the declarant is not present at trial. His absence deprives the trier-of-fact of the opportunity to assess the declarant’s demeanor and credibility. Third, the declarant is not subject to cross-examination. Indeed in criminal cases, the denial of the defendant’s right to test the declarant’s statement in the crucible of cross-examination rises to constitutional magnitude.”), *cert. denied*, 479 U.S. 1011 (1986).

Non-Hearsay Purpose

A statement may be admitted without violating the hearsay rule if it is admitted for a non-hearsay purpose. In other words, the statement is admissible if offered not to prove the truth of the matter asserted (which would be

Overview

Documents may contain key evidence to connect a party to other evidence or a significant transaction or event in a case. Since documents contain statements, a common objection to their admission is a hearsay challenge. The term “statement” is defined under FRE 801(a). The definition includes “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” *See also* ACN (“The effect of the definition of ‘statement’ is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.”). “Hearsay” is defined under FRE 801(c) as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” (Emphasis added); *see also Anderson v. United States*, 417 U.S. 211, 219 (1974) (“Out of court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted.”). Hearsay evidence is normally admissible under FRE 802 unless either (a) a hearsay exception is available or (b) the statement is introduced for a non-hearsay purpose.



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